

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Petition 14 of 2008

BENJAMIN RUGUT KIHARA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is a constitutional petition brought under **Sections 70, 72(1), (2) and (3) and 77(1)** of the Constitution as well as **Section 123** of the **Criminal Procedure Code** in which **Benjamin Rugut Kihara**, the applicant, seeks a declaration that the criminal charges brought against him in Kabarnet SRM Criminal Case No.423 of 2008 are oppressive, discriminative and unconstitutional and should therefore be unconditionally discharged. The petition is based on the ground that though the Applicant was arrested for bailable offences he was detained in the police custody for more than 24 hours.

The facts of the case are simple and straight forward. The Appellant was arrested at Tenges on 20th July 2008 and kept in the administrative police camp there until the following day when he was taken to Kabarnet Police Station where he was detained for another day before he was taken to court on 22nd July 2008. When he appeared in court on that day he was charged with the offences of transporting *osrisa lanceolata* (saddlewood) without authority contrary to **Section 52(1)(a) and (2)** of the **Forest Act 2005**, being in possession of *osrisa lanceolata* (saddlewood) contrary to **Section 34(1) and (2)** and read with **Section 57(1)(c)** of the **Forest Act 2005** and **Gazette Notice No. 3175 of 4th April 2007** and removing seven tones of saddlewood, a protected tree species without authority contrary to **Section 54(8)(d)** as read with **Section 55(1)(c)** of the **Forest Act 2005**. On his application the taking of the plea was deferred pending the filing and determination of this reference.

In his petition and the affidavit in support thereof he complains that there was no good reason why he was not taken to court within 24 hours as required by law. He dismissed the prosecution explanation that Tenges AP Camp is far from Kabarnet and said that it is only about 20 kilometres away. In the circumstances he prays that his petition be allowed and the charges he faces before the Senior Resident Magistrate at Kabarnet be declared oppressive and therefore unconstitutional and he accordingly be set free.

Mr. Mugambi for the state urged me to accept the police explanation given to the subordinate court and dismiss the application.

I have perused the lower court record. The reason police gave the Senior Resident Magistrate for not taking the Applicant to court within 24 hours that he was arrested at Tenges which is far away from Kabarnet Police Station and court. They also stated that the vehicle the Applicant was using in transporting the saddlewood was defective and could not therefore be started and driven to Kabarnet immediately.

This to me appears to be a reasonable explanation. The applicant was arrested by Administration Police Officers at Tenges. They had to take him to Kabarnet Police Station where he could be charged. He has not disputed the fact that his vehicle broke down could therefore not be driven to Kabarnet immediately. Further more on 20th July 2008 when he was arrested was a Sunday. So the delay in taking him to court was actually for one day. I believe this is what the Court of Appeal had in mind the in the case of Paul

Mwangi Murunga Vs Republic, Criminal Appeal No. 35 of 2006, when it stated that “the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that.” We should also bear in mind the fact that constitutional rights are not enjoyed in abstract. The court has always to weigh the applicant’s rights against those of others including those of the general public before deciding which side the scales of justice tilt. Needless to say that the preservation of saddlewood and our forests in general is a matter of great public importance which should be accorded the importance and care it deserves.

For these reasons I find no merit in this petition and I accordingly dismiss it with costs. I direct that the Applicant should appear before the Senior Resident Magistrate at Kabarnet within seven days of the date hereof to plead to the charges against him. I hope by then the prosecution will have amended the charges as opined by the trial magistrate.

DATED and delivered at Nakuru this 21st day of November, 2008.

D. K. M ARAGA

JUDGE.